343. It is the visceral, not the legal question of church immunity which deserves a moment's pause. Americans want very much to have faith that church people would not violate the civil law, and not only because the church is a powerful institution and churches generate lots of FCC mail.

344. Most of the Synod's witnesses comported themselves decently on the stand. They were well spoken and courteous. They were not the great unwashed and they were not flaming reactionaries. Three of KFUO's witnesses testified in clerical robes. You'd want them to marry your daughter in the capacity of minister or groom. They weren't Harry Serafin, see Catoctin Broadcasting Corp. of New York v. FCC, 4 FCC Rcd 2553 (1989), recon denied, 4 FCC Rcd 6312 (1989), aff'd per curiam by Memorandum, No. 89-1552 (released December 18, 1990).

345. But the FCC doesn't give licenses in perpetuity to people because they're courteous and gentle of manner. Even the most guilty defendants always dress for success and act deferential in court. The Commission has a higher purpose, protecting the listeners.52/

52/ Or in KFUO's case, protecting nonlisteners who wanted a job. See ¶¶250-278 supra.

346. Three years after the Synod acquired KFUO, Congress enacted the Radio Act of 1927. That statute required licensees to waive any claim to "any particular frequency or wave length or...the ether as against the regulatory power of the United States." J. Roger Wollenberg, "The FCC as Arbiter of 'The Public Interest, Convenience and Necessity,'" in Max Paglin, Ed., A Legislative History of the Communications Act of 1934 (1989) at 61, 72. That provision survives today, less archaically worded, as Section 304. It means No Squatters Rights.

347. KFUO's witness' demeanor was exhibited too late to save these licenses. The majority of KFUO's misconduct didn't occur on the witness stand. See ¶¶218-278 supra. It occurred before this case was ever tried, during the license term and during the predesignation period. If Jesus had come again, sworn himself in and testified in this case, he couldn't undo what was already done. As the Second Circuit has observed, quoting Agathon, "[f]or this alone is lacking even to God, To make undone things that have once been done." Fitzgerald v. Pan American World Airways, 229 F.2d 499, 502 (2d Cir. 1956).53/

53/ Fitzgerald, which deserves a wider reading, is the Brown versus the Board of airline travel. In desegregating the nation's airlines, the Second Circuit offered the above-cited quotation (sourced through Aristotle) to support its observation that specific performance could not lie because "no order of the [CAB] can compel the defendant to permit the plaintiffs to board defendant's plane on July 19, 1954." The plaintiff, her accompanist and secretary had been denied boarding because of their race. They were in Hawaii on the way to a performance in Australia. Id. at 500. If the Court hasn't guessed, she is Ella Fitzgerald.

D. Strong Policy Considerations Justify Denial Of The Renewal Applications

348. What does the business of broadcasting as we practice it in the United States stand for? Ascertainment, the Fairness Doctrine and most structural regulation are gone. What, then, distinguishes our system of allocation of scarce broadcast spectrum resources from the regulation of toasters?

349. What distinguishes it, indeed, what is left of it, is equal opportunity. The Commission's reliance on EEO to meet its obligation under Section 315 of the Act to promote diversity has become so profound that it generally invokes EEO as a shield whenever it deregulates in another area.54/

350. EEO has taken on special importance as technologies converge. Equal Employment Opportunity Rules (NOI), 9 FCC Rcd 2047 ¶1 (1994). This convergence has brought the Commission full circle. When it first considered adopting the EEO Rule, it cited with approval this statement by the Department of Justice:

54/ In Deregulation of Radio 73 FCC2d 457, 482 (1979) (notice of proposed rulemaking), the Commission reassured the public that "[e]fforts to promote minority ownership and EEO are underway and promise to bring about a more demographically representative radio industry." In adopting its ultimate rules in Deregulation of Radio, 84 FCC2d 968, 1036, recon. granted in part, 87 FCC2d 797 (1981) aff'd in pertinent part sub nom. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983), the Commission held that "it may well be that structural regulations such as minority ownership programs and EEO rules that specifically address the needs of these groups is preferable to conduct regulations that are inflexible and often unresponsive to the real wants and needs of the public." It explicitly concluded that the minority ownership policies and EEO rules, rather than direct regulation of broadcast content, were the preferable means to achieve diversification. Id. at 977.

> Because of the enormous impact which television and radio have upon American life, the employment practices of the broadcasting industry have an importance greater than that suggested by the number of its employees. The provision of equal opportunity in employment in that industry could therefore contribute significantly toward reducing and ending discrimination in other industries.

Nondiscrimination in Broadcasting, 13 FCC2d 766, 771 (1968).

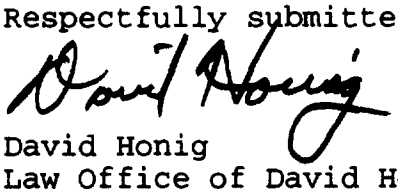
351. Public confidence in the EEO Rule is predicated on strict and voluntary compliance. Every minority, every woman, and every person whose religious faith is private to him or her, will be profoundly affected by what the Court does here. For if a licensee can violate each element of the EEO Rule, cover it up, invent prolix pretexts and lie to tell about it, then truly Section 304 of the Act will be robbed of its meaning. We will have Squatters Rights and the law of the marketplace will be the Only Law.

ULTIMATE CONCLUSIONS OF LAW

352. KFUO's discrimination and coverup render it utterly unqualified to hold any broadcast authorizations. Because these abuses were so palpable, the strongest possible sanctions are warranted. See BHA Enterprises, Inc., 31 RR2d 1373, 1404 (ALJ 1974) ("the continuing pattern of conduct of this licensee over the years which was violative of the Act and regulations and the cumulative nature of the violative acts of the licensee constitute a wanton disregard of the obligations owned by a licensee which calls for the imposition of the sanction of revocation of the licenses.") KFUO's conduct is "so reprehensible as to warrant disqualification." Carnegie Broadcasting Corp., 5 FCC2d 882, 885 (1966).

353. WHEREFORE, it is respectfully submitted that the applications for renewals of licenses of The Lutheran Church/Missouri Synod should be denied.55/

Respectfully submitted,



David Honig
Law Office of David Honig
1800 N.W. 187th Street
Miami, Florida 33056
(305) 628-3600
(202) 332-7005

Counsel for the Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP, and the St. Louis County Branch of the NAACP

September 6, 1994

55/ The NAACP warmly recognizes the invaluable assistance of Ronda Robinson, Esq., Dahlia Hayles, Michael Blanton, and Erik Williams in the research and prosecution of this case.

CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 6th day of September, 1994, caused a copy of the foregoing "Findings of Fact and Conclusions of Law" to be delivered by hand to the following:

Hon. Arthur Steinberg
Administrative Law Judge
Federal Communications Commission
2000 L Street N.W.
Room 228
Washington, D.C. 20554

Robert Zauner, Esq.
Paulette Laden, Esq.
Hearing Branch
Mass Media Bureau
Federal Communications Commission
2025 M Street N.W.
Room 7212
Washington, D.C. 20554

Richard Zaragoza, Esq.
Kathryn Schmeltzer, Esq.
Fisher, Wayland, Cooper & Leader
2001 Pennsylvania Avenue N.W.
Washington, D.C. 20006

David Honig